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No. 86-493

# In the Supreme Court of the United States

OCTOBER TERM, 1986

TEXAS STATE COMMISSION FOR THE BLIND AND THE STATE OF TEXAS, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the government is precluded from challenging an adverse arbitration award in a claimant's enforcement action under the Randolph-Sheppard Vending Stand Act ("Randolph-Sheppard Act"), 20 U.S.C. 107 *et seq.*

2. Whether, in the absence of an express statute of limitations, a court should infer a limitations period to bar the government from challenging an adverse arbitration award in an enforcement action brought under the Randolph-Sheppard Act.

3. Whether the court of appeals correctly construed the exemption from the income-sharing provisions of the Randolph-Sheppard Act for "income from vending machines within retail sales outlets under the control of exchange or ships' stores systems authorized by title 10" (20 U.S.C. 107d-3(d)).

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A58) is reported at 796 F.2d 400. The opinion of the Claims Court (Pet. App. B1-B21) is reported at 6 Cl. Ct. 730. The opinion of the arbitration panel (Pet. App. C1-C22) is unreported.

### JURISDICTION

The judgment of the court of appeals en banc was entered on June 26, 1986. The petition for a writ of

certiorari was filed on September 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In 1936, Congress passed the Randolph-Sheppard Vending Stand Act ("Randolph-Sheppard Act"), 20 U.S.C. 107 *et seq.*, whose purpose, as amended, was to "provid[e] blind persons with remunerative employment * * * [by] authoriz[ing] [them] to operate vending facilities on any Federal property" (20 U.S.C. 107(a)). To implement this program, the Department of the Interior [1] was authorized to designate state agencies to license blind persons to operate vending stands at various federal properties within the state. 20 U.S.C. 107a(b).

Over the years, Congress discovered that in many federal buildings vending machines operated by federal civilian organizations, such as unions and other organizations of government employees, were competing for business with vending stands operated by blind persons. Accordingly, in 1974 Congress amended the Randolph-Sheppard Act to provide that certain income from vending facilities and machines on federal property be shared either with blind vendors directly or with the state agencies that provide for the welfare of blind persons. Pub. L. No. 93-651, § 206, 89 Stat. 2-12 (20 U.S.C. 107d-3). Congress, however, exempted from these income-sharing provisions "income from vending machines within retail

[1] Subsequently, the Department of Health, Education, and Welfare (HEW) was assigned this responsibility. In 1979, HEW's functions under the Randolph-Sheppard Act were transferred to the Secretary of Education. Pub. L. No. 96-88, §§ 301(a)(4)(B) and 507, 93 Stat. 678 and 692. References to HEW in this brief include that agency and its successor.

sales outlets under the control of exchange or ships' stores systems authorized by title 10." 20 U.S.C. 107d-3(d). By regulation, the Department of Defense ("DOD") has construed this exemption as encompassing "[i]ncome from vending machines operated by or for the military exchanges or ships' stores systems" (32 C.F.R. 260.3(i)(3)(i)), *i.e.*, as including machines operated by or for military exchanges even if not located physically "within" an exchange retail outlet. Pet. App. A4.

2. Petitioners are the State of Texas and the agency that has been designated to implement the Randolph-Sheppard Act in that state. In May 1979, petitioners filed a complaint with HEW asserting a right to a share of the income derived from vending machines operated by the military exchanges in Texas. Petitioners argued that the exemption contained in 20 U.S.C. 107d-3(d) covers only those vending machines that are physically located within the four walls of a military exchange retail outlet.

Pursuant to 20 U.S.C. 107d-1(b), HEW convened an arbitration panel. By a divided vote, the panel—while acknowledging "substantial legislative history" to the contrary (Pet. App. C12)—upheld petitioners' claim (Pet. App. C1-C22). Petitioners thereafter brought an action in the United States Claims Court to enforce the arbitration award. On November 26, 1984, the Claims Court ruled in petitioners' favor (Pet. App. B1-B21).[2]

3. The court of appeals reversed by a divided vote (Pet. App. A1-A58). A five-judge plurality held (Pet. App. A25) that the language of the military

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[2] The Claims Court first held (Pet. App. B10-B12) that the government had the right to contest the arbitration decision in defense of petitioners' enforcement action.

exchange exemption was "not without some ambiguity." Because "[t]he parsing of sentences is a meaningless exercise here" (Pet. App. A26), the plurality examined the legislative history and purpose of the exemption. At length (Pet. App. A9-A24), the court examined prior drafts of the legislation (Pet. App. A13), relevant legislative reports (Pet. App. A15), and congressional debates (Pet. App. A15-A17), concluding that "[a]ll legislative history expressly addressing the possible diversion of income from the exchanges indicates that income was to be exempt" (Pet. App. A18). The court noted that "the only services financed by the funds of the military exchanges are child care centers, libraries, youth activities, gymnasiums, arts and crafts facilities, and similar essential support services, which are furnished around the world for military personnel and families" (Pet. App. A10-A11); and the court could discern "[n]o rational reason * * * to conclude that Congress intended military personnel and their families to support the blind by giving up essential services" (Pet. App. A10). On the contrary, "[t]he * * * legislative history noted above indicates that the funds Congress anticipated would be used for the state agencies for the blind were funds which could be diverted at *no cost* to the government and *no diminution* in essential government services" (*ibid.*) (emphasis in the original)). Accordingly, the plurality held that the DOD regulation—construing the exemption in Section 107d-3(d) to cover all income from vending machines operated by a military exchange—was "reasonable and * * * not in conflict with the intent of Congress as expressed in the statute" (Pet. App. A26).

Three judges concurred in the result (Pet. App. A28-A30). In their view, while the plurality had "overstress[ed] the alleged 'ambiguity' of the statute" (Pet. App. A28), nevertheless "the germane legislative history is very strong and points to the wider construction [under which] all vending machines operated by the military exchanges are exempt from the income sharing provision" (Pet. App. A29). The concurring opinion concluded that "the significant legislators concerned with the precise question before us deliberately and knowingly chose the military version of the meaning of the disputed phrase" (Pet. App. A30).

Two judges dissented, each joining a separate opinion authored by the other (Pet. App. A31-A57, A58). They found "nothing ambiguous or superfluous in the statutory exemption" (Pet. App. A31-A32) and that "the plain and customary meaning of the word 'within' clearly connotes spatial boundaries" (Pet. App. A34 (footnote omitted)). Thus, the dissent concluded, the phrase " 'within retail sales outlets' " limits the exemption solely to those vending machines " 'physically within the walls of a store' " (Pet. App. A35).[3]

**ARGUMENT**

1. Petitioners first contend (Pet. 7-12) that because under Section 107d-1(b) the decision of the arbitrators was "final and binding" and because under Section 107d-2(a) it was "subject to appeal and review as a final agency action for purposes of chap-

[3] The dissenters conceded (Pet. App. A33) that the only other circuit to have considered the issue had reached the same result as the plurality. See *Oklahoma ex rel. Dep't of Human Services* v. *Weinberger*, 741 F.2d 290 (10th Cir. 1983), cert. denied, 466 U.S. 971 (1984).

ter 7 of * * * Title 5 [the Administrative Procedure Act]," which allows review to be sought by an aggrieved "person," the government was not entitled to dispute the panel's award in petitioners' enforcement proceeding. Petitioners reason (Pet. 8-9) that federal agencies are not "persons" within the meaning of 5 U.S.C. (& Supp. II) 702 and thus may not appeal an adverse arbitration judgment. The courts below correctly rejected that contention, as did the only other court that has considered it. *Georgia Dep't of Human Resources* v. *Bell*, 528 F. Supp. 17, 22 (N.D.Ga. 1981).

The issue here, as the court of appeals noted (Pet. App. A8 n.8), is not whether the government can *appeal* an adverse arbitration ruling, but rather "whether the presence of a specific provision in the Act allowing appeal by the claimant bars the U.S., by implication, from defending against enforcement of the award." Petitioners' position, for which they cite no authority, is that the government has no right of appeal and therefore may not defend any enforcement proceeding on the ground that the arbitrator erred in interpreting the law. The consequence of that position, as petitioners acknowledge (Pet. 9-12), would be to deny the government any opportunity to present its construction of the Randolph-Sheppard Act to a court at any stage. That is plainly not what Congress intended. Indeed, the 1974 amendments to the Randolph-Sheppard Act, Pub. L. No. 93-516, § 206, 88 Stat. 1626—which in Section 206 added to the Act the very provisions relied on by petitioners (now codified at 20 U.S.C. 107d-1(b), 107d-2(a))—made clear that Congress did not intend to bar the federal government from contesting a suit to enforce an arbitration award. Section 201 of those amend-

ments—setting out the "Congressional Findings" that resulted in the 1974 amendments—provided, in pertinent part, that "to insure the continued vitality and expansion of the Randolph-Sheppard Program [it was necessary to] * * * (E) establish administrative and *judicial procedures* under which fair treatment of blind vendors, State licensing agencies, *and the Federal Government* is assured" (emphasis added). Moreover, during the hearings culminating in the 1974 amendments the testimony of the national representative of the American Council for the Blind specifically recognized that federal agencies could challenge the results of arbitration proceedings in court. *Randolph Sheppard Act For The Blind Amendments of 1973: Hearings on S. 2581 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 175 (1973) (testimony of Durward McDaniel, American Council for the Blind).

2. Conceding that neither the Randolph-Sheppard Act nor the APA imposes a statute of limitations on the government's right to defend in an enforcement proceeding (Pet. 13, 15), petitioners nevertheless contend (Pet. 14) that this Court should "impose [a] short statute[] of limitations." This claim is without merit. As the court of appeals noted (Pet. App. A8 n.8), in the absence of an explicit statute of limitations the courts are not free to impose a limitations period where, as here, the government seeks to vindicate a public right or interest. See *INS* v. *Hibi*, 414 U.S. 5, 8 (1973) (" 'as a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest' "); *United States* v. *Summerlin*, 310 U.S. 414 (1940);

*Guaranty Trust Co.* v. *United States*, 304 U.S. 126 (1938); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917); *United States* v. *Beebe*, 127 U.S. 338, 344 (1888).[4]

3. On the merits, petitioners contend (Pet. 16-34) that the court of appeals erred in construing 20 U.S.C. 107d-3(d) to exempt from the income-sharing provisions income from all machines operated by military exchanges and not merely the income from machines physically located within an exchange retail facility. The court of appeals, consistent with the only other court of appeals to have addressed the issue, *Oklahoma* v. *Weinberger*, *supra*, properly rejected petitioners' reading of the exemption—a reading that is plainly inconsistent with the evident purpose of Congress in adopting 20 U.S.C. 107d-3(d). See *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978).

a. As the court of appeals noted (Pet. App. A25), the phrase " 'within retail sales outlets' is not without some ambiguity. 'Within' can mean 'a part of' a system as well as 'inside' a structure." There would have been no logical reason to adopt an exemption based on physical location; indeed, a 1978 survey

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[4] Petitioners are mistaken in contending (Pet. 14) that the court of appeals' refusal to impute a statute of limitations in this case is in conflict with the Seventh Circuit's decision in *Chaffeurs Local No. 135* v. *Jefferson Trucking Co.*, 628 F.2d 1023 (1980), cert. denied, 449 U.S. 1125 (1981). *Jefferson Trucking* was an action by a union to enforce an arbitrator's judgment against an employer. The United States was not a party and, perforce, was not engaged, as it was here, in asserting a public right or interest. For the same reason, petitioners' reliance (Pet. 13) on *DelCostello* v. *Int'l Brotherhood of Teamsters*, 462 U.S. 151 (1983), is misplaced.

showed that only about 1.3% of the vending machines operated by the military exchanges were physically located within the four walls of particular sales outlets (Pet. App. C19) and that most of the machines found within the four walls of retail outlets are in locations earning less than $3,000 annually (Pet. App. C9) and are therefore exempt under an entirely distinct portion of Section 107d-3(d). Accord, *Oklahoma* v. *Weinberger*, 741 F.2d at 292-293. Petitioners' construction of the military exchange exemption would therefore deprive the exemption of either sense or practical application.

b. On the other hand, an intention not to make military families give up exchange benefits to support the blind makes perfect sense, and the legislative history unmistakably confirms the court of appeals' construction of the military exchange exemption as serving that purpose. The Senate Report accompanying the 1974 amendments to the Act made clear that the exemption from the income-sharing requirements was intended to cover all vending machines operated by the military exchanges. As the Senate Report explained (S. Rep. 93-937, 93d Cong., 2d Sess. 24 (1974)):

> Subsection (d) exempts certain activities from vending machine income assignment. Both military exchange systems and the Veterans Canteen Service operate under specific statutory authority, and are thus, as a matter of policy, excluded.[5]

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[5] Petitioners characterize the Senate Report as "erroneous," arguing (Pet. 30) that the exchanges do not operate under "specific statutory authority." Although not created by statute, the exchanges do derive authority from statutes charging the secretaries of the armed services with responsibility for

Any doubt as to Congress's intent regarding the scope of the military exchange exemption was laid to rest in the Brademas-Sikes colloquy, relied on by the court of appeals (Pet. App. A16-A17). Accord, *Oklahoma* v. *Weinberger*, *supra*. Representative Brademas was the chairman of the subcommittee that sponsored the 1974 amendment and the floor manager of the bill in the House of Representatives (Pet. App. A15)[6]; Representative Sikes was the chairman of the Military Construction Subcommittee of the House Appropriations Committee. [1947] 1 U.S. Code Cong. & Admin. News CIII.[7] During debates on the amendments, Representative Sikes sought clarification regarding the exemption for military exchanges (120 Cong. Rec. 35712 (1974)):

> I would like the distinguished subcommittee chairman to verify for the record, that this provision exempts from the revenue-sharing plan all those vending machines which are operated by the military post exchanges, Navy exchanges, officer and enlisted messes, and so forth.
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> * * * * *

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the welfare and effectiveness of the military. 10 U.S.C. 3012, 5031, 8012. See generally *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942).

[6] See *North Haven Board of Educ.* v. *Bell*, 456 U.S. 512, 526-527 (1982) ("remarks [of] the sponsor of the language ultimately enacted * * * are an authoritative guide to the statute's construction"); *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (such statements "deserv[e] to be accorded substantial weight"); *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66 (1964); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951).

[7] The court of appeals incorrectly referred to Representative Sikes as the chairman of the House Armed Services Committee. Pet. App. A16.

> Would the gentleman confirm for me the fact that it is the intent that this paragraph shall not apply to the military services, and that this is in keeping with the language on page 24 of the Senate Report (S. Rept. No. 93-937) which is more specific on this issue than is the conference report?

Representative Brademas's response was clear: "I am pleased to tell the gentleman that the answer to both his questions is 'Yes.'" 120 Cong. Rec. 35712 (1974).[8]

As Representative Sikes explained, the profits from the exchanges' vending machines were used by the military to finance essential morale, welfare, and recreational activities for members of the armed services. If those revenues were shared with the states, these military programs either would be terminated or would have to be funded through DOD appropriations; neither of these options was deemed acceptable. 120 Cong. Rec. 35712 (1974). Petitioners' interpretation entails precisely that result: substantial amounts of the revenue from these vending machines would be shared with state agencies; and either basic services to the military would be curtailed or new federal appropriations would be required. As noted by the court of appeals (Pet. App. A9-A10), that is flatly inconsistent with the congressional plan.

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[8] Petitioners argue (Pet. 29-30) that the Brademas-Sikes colloquy deserves little weight because, at one point in the exchange, the exemption appears to have been construed more broadly than it is by DOD. This argument was properly rejected by both courts of appeals in this case and in *Oklahoma* v. *Weinberger, supra.* The portion of the colloquy upon which the government relies deals explicitly with the issue in this case and is consistent with the policy articulated elsewhere in the legislative history.

c. The only other court of appeals to have addressed the scope of the military exchange exemption reached the same conclusion. In *Oklahoma* v. *Weinberger*, *supra*, the Tenth Circuit agreed (741 F.2d at 292) that the reading of the exemption for which petitioners contend here "would lead to absurd results" and "thwart the obvious purpose of the statute"—particularly in view of the minimal number of vending machines "actually physically located inside an exchange" (*id.* at 293). Relying also on the Brademas-Sikes exchange (*ibid.*), the court of appeals held that the exemption in Section 107d-3(d) "applies to *all* machines of the military exchanges" (741 F.2d at 292 (emphasis in original)).

d. Finally, the court of appeals correctly refused to rely on HEW regulations pertaining to the military exchange exemption. Indeed, HEW's published regulations do *not* support petitioners' position, in that the regulations do little more than repeat the language of the statute. 42 Fed. Reg. 15816 (1977), codified at 34 C.F.R. 395.32(i). Earlier constructions by HEW remained internal and were never published as regulations; they therefore have limited legal significance. See *Montana* v. *Blackfeet Tribe of Indians*, No. 83-2161 (June 3, 1985), slip op. 8 n.7 (refusing to defer to unpublished opinion of the Department of the Interior that was later reversed in a published opinion); *SEC* v. *Sloan*, 436 U.S. 103, 117-118 (1978); *Northern Colo. Water Conservancy Dist.* v. *FERC*, 730 F.2d 1509, 1519-1520 (D.C. Cir. 1984); *Franklin* v. *Community Fed. Sav. & Loan Ass'n*, 629 F.2d 514, 517 (8th Cir. 1980) ("unofficial staff interpretations are not entitled to the same respect given official interpretations of an administrative agency"); *Grunebaum* v. *Commissioner*, 420 F.2d 332, 336 (2d Cir.), cert. denied, 397 U.S. 1075 (1970) (proposed amendment to published regulation

could not be considered in interpreting statute). Cf. *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287-288 & n.5 (1978). In any event, at HEW's request, the dispute between that agency's internal interpretation and DOD's published regulation was referred to the Department of Justice for resolution. The Department of Justice concluded that DOD's regulation better reflected Congress's intent in passing the military exchange exemption.[9] As the court of appeals stated (Pet. App. A24 (emphasis in the original)), "[i]nternally, HEW has vacillated. Its published regulations have *never* set forth an interpretation of the statutory language. Its late-adopted private interpretation was never published or given effect. It is bound by Justice's interpretation." Under these circumstances, the court of appeals did not err in declining to accept HEW's internal statement of its views.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1986

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[9] Petitioners' suggestion (Pet. 21-22) that the Department of Justice did not play a neutral role in resolving the conflict between HEW and DOD is utterly without support in the record and is contrary to the conclusions of both the Federal Circuit and the Tenth Circuit. Pet. App. A23-A24; *Oklahoma* v. *Weinberger*, 741 F.2d at 293.

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